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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of JAVIER and AILEEN
RIOS.

2d Civil No. B202194
(Super. Ct. No. D321331)
(Ventura County)

JAVIER RIOS,

Appellant,

v.

AILEEN RIOS,

Respondent.

Husband appeals an award of temporary child and spousal support. We remand for a retroactive adjustment to account for an unsubstantiated \$90 monthly medical insurance expense claimed by wife. In all other respects we affirm.

FACTS

Neither party provides an adequate statement of facts. They seem to make the unwarranted assumption that we are as familiar with their case as they are. Nevertheless, we have done our best to state the facts as accurately as possible.

The parties have a minor child of the marriage, born in July of 2004. By stipulation, they have joint legal and equal physical custody of the child. The parties' community property includes their principal residence and a rental property.

On June 12, 2007, the court held a hearing on interim spousal and child support and on possession of the principal residence. The parties agreed that husband would have possession of the residence as of July 1, 2007, and would be solely responsible for the mortgage payment. The parties also agreed that husband could apply income from the rental property to the mortgage payment.

In calculating interim support, the trial court designated husband as head of the household for tax purposes. The court also allocated to husband a tax deduction for the interest husband would pay on the principal residence. Husband objected to the allocation of the deduction on the ground that the parties do not know what they are going to do with their taxes. Wife refused to stipulate that husband would actually be able to take the deduction on his tax return. The court stated: "It's done all the time for temporary orders for support; that the person making the house payment . . . has an interest deduction."

Wife's income and expense declaration showed an income from her job as a receptionist of \$520 per week and income for the last month of \$2,080. The \$2,080 amount was entered in the DissoMaster as wife's average monthly income. Husband stated that wife has additional income that she did not report. Husband also objected that wife reported an expense of \$90 per month for health insurance that she does not pay. The parties agreed to reserve questions about whether wife has unreported income from cutting hair and the \$90 insurance expense for a future hearing.

The court accepted the DissoMaster calculations presented to it and ordered child support of \$290 per month and temporary spousal support of \$336 per month. The court stated the order was "without prejudice to retroactively modifying child support and spousal support on a temporary basis . . . if we find that some of the calculations such as health insurance and additional incomes are inaccurate as represented by the parties today."

The court continued the hearing. At the continued hearing, husband asked for reconsideration of the amount of support. Husband claimed that the trial court erred in assigning head of household status to him; that wife's wages were not properly calculated; that wife was not credited with \$300 rental income; that wife was not entitled to a \$90 medical insurance payment expense; that the trial court erred in assigning him an income tax deduction for all interest paid on the parties' principal residence; and that the trial court did not take the best interest of the child into consideration. The trial court denied husband's motion for reconsideration, and affirmed the original temporary support order.

DISCUSSION

Husband contends the trial court erred in calculating temporary support.

(a)

Husband argues the trial court erred in unilaterally assigning a tax filing status to husband for the sole purpose of calculating support.

In calculating interim child support, the court designated husband as "head of household" for tax purposes. He claims that the appropriate filing status that should have been used is "married filing jointly." Husband cites *In re Marriage of Carlton & D'Alessandro* (2001) 91 Cal.App.4th 1213, 1218-1219, for the proposition that the court has no discretion to assign a party a tax filing status that differs from his actual status. But in *Carlton & D'Alessandro*, husband did not qualify for the tax filing status the court assigned. Here husband cites no authority that he does not qualify as head of household.

Instead, he claims the trial court should have ordered that husband have the right to file his tax return as head of household. The trial court refused to so order because the parties may want to file joint returns, and wife has no ability to stop husband from filing as head of household. Indeed, husband cites no authority that wife has the ability to prevent him from filing as head of household. The trial court did not abuse its discretion.

(b)

Husband argues the trial court erred in not using wife's proper wages.

Wife's income and expense declaration show an income of \$520 per week. It shows last month's wages as \$2,080. The space for average monthly income over the last 12 months is left blank. The trial court used \$2,080 monthly income in calculating support.

Husband did not object to using \$2,080 until his motion for reconsideration. Then he attempted to show wife's average monthly income for the last 12 months was \$2,853.33. In addition, husband objected wife did not include \$300 per month rent she was receiving from her brother in the calculation.

The trial court refused to consider husband's offer to show wife's average monthly income was \$2,853.33 on the ground husband should have raised the issue at the original hearing. Husband's only explanation for his failure to do so was that his counsel did not have adequate time to review the calculations. The trial court apparently did not find that explanation sufficient. Indeed, the discrepancy of which husband complains is apparent from the face of wife's income and expense declaration.

Wife argues the trial court reserved jurisdiction to reconsider the support order if the court found the calculations as represented by the parties to be inaccurate. But the trial court's reservation of jurisdiction was to resolve questions that husband did raise at the first hearing, such as whether wife's claim of a \$90 per month health insurance payment was accurate and whether wife had unreported income from cutting hair. There would be no need to reserve jurisdiction over matters to which husband raised no objection.

Wife received \$300 in rental income from her brother while he was living with her in the family residence. But because husband was moving into the family residence, wife would no longer have that income.

The trial court did not abuse its discretion in denying wife's motion for reconsideration.

(c)

Husband contends the trial court erred in not using the proper deductions in calculating support.

Husband argues that the trial court erred in giving wife a \$90 per month medical insurance deduction. Husband challenged the deduction at the original temporary support hearing. The trial court awarded temporary support without prejudice to retroactive modification if the health insurance calculation was inaccurate. Husband again objected to the \$90 deduction at the second hearing.

Wife points to no evidence that she actually paid \$90 per month for medical insurance. Wife simply argues that husband produced no evidence that she did not pay for medical insurance. But it was wife who claimed the deduction, and it was undisputed husband was paying for medical insurance for the entire family. The trial court erred in not considering the \$90 deduction in a retroactive adjustment of the temporary support payment.

Husband also claims the trial court erred in using interest payments on the family residence as husband's itemized deduction. Husband argues that each party would be claiming an interest deduction for income tax purposes.

But husband moved into the family residence on July 1, 2007, the same day temporary support was ordered to begin. Because husband would be entitled to the full deduction for interest payments from the date temporary support began, the trial court did not abuse its discretion in allocating the full interest deduction to husband.

II

Husband contends the trial court abused its discretion in refusing to take the best interest of the child into consideration.

Husband argues he is forced to work 50 to 65 hours a week and yet after expenses he has nothing left on which to live. But husband's expenses are to a large extent attributable to his decision to live in the family residence. The trial court did not abuse its discretion.

The order is reversed and remanded for retroactive adjustment of support to account for the unsubstantiated \$90 medical insurance payment claimed by wife. In all other respects, the order is affirmed. Each party shall bear his or her own costs.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Bruce A. Young, Judge
Superior Court County of Ventura

Laurie Peters for Appellant.

George H. Holman for Respondent.